COURT OF APPEAL FOR ONTARIO

CITATION: Davis v. Aviva General Insurance Company, 2024 ONCA 944
DATE: 20241227
DOCKET: COA-24-OM-0193

Sossin, Madsen and Pomerance JJ.A.

BETWEEN

Carrie-Anne Davis

Appellant (Responding Party)

and

Aviva General Insurance Company* and
the Licence Appeal Tribunal**

Respondents
(Moving Party*/Responding Party**)

Geoffrey L. Keating, for the moving party, Aviva General Insurance Company

Gordon W. Harris, for the responding party, Carrie-Anne Davis

Douglas Lee, for the responding party, the License Appeal Tribunal

Heard: in writing

Sossin J.A.:

[1] The moving party, Aviva General Insurance Company, seeks leave to appeal from the decision of the Divisional Court dated May 31, 2024, with reasons reported at 2024 ONSC 3054.

APPLICABLE TEST FOR LEAVE TO APPEAL

[2] The practice of this court is that decisions on leave to appeal motions generally are not accompanied by reasons. I depart from that practice here in order to address a question of uncertainty that has arisen in light of comments made by a panel of this court in granting leave to appeal in *West Whitby Landowners Group Inc. v. Elexicon Energy Inc.*, 2024 ONCA 910 ("*West Whitby*").

[3] The principles governing motions for leave to appeal decisions of the Divisional Court were set out succinctly in *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, [1973] 2 O.R. 479 (C.A.) ("*Sault Dock*"). The court explained those principles in the following passage:

> Upon the creation of the Divisional Court there was conferred upon it with respect to a specified category of cases the appellate jurisdiction which hitherto had been exercised by the Court of Appeal. Appeals from an appellate decision of the Divisional Court to the Court of Appeal are limited by providing that an appeal lies only:
>
> a. with leave
>
> b. on a question that is not a question of fact alone.
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> Consideration of the statutory enactments concerning the Divisional Court, particularly those restricting the appeals from the orders or judgments of that Court, indicates that as a general rule, decisions in matters coming before the Divisional Court in its appellate capacity are intended to be final and that review of those decisions by the Court of Appeal are to be the exceptions to the general rule. These matters, which before the establishment of the Divisional Court terminated in the Courts of Ontario when a decision was rendered by the

Court of Appeal, would normally terminate with the decision of the Divisional Court.

The magnitude of the amount involved is not of significance in deciding whether or not leave should be granted. A case involving a comparatively small sum of money may well be of more importance to the litigants than is a vastly greater amount to the contestants in another action. Every decision of a Court is of importance to the parties affected but when no appeal is allowed on questions involving fact alone, then the importance of the decision to the individual is not to be the sole or perhaps the paramount consideration. It is rather the impact which the decision on the question will have on the development of the jurisprudence of Ontario. If the resolution of the question would largely have significance only to the parties and would not settle for the future a question of general interest to the public or a broad segment of the public, the requirements to obtain leave will not have been met.

While it may not be desirable to attempt to formulate a catalogue of the circumstances under which leave to appeal would be granted by this Court, to carry out what is considered to be the purpose of the Legislature, the Court of Appeal should be satisfied before granting leave that the matter will present an arguable question of law or mixed law and fact requiring of the Court consideration of matters such as the following:

> (a) the interpretation of a statute or Regulation of Canada or Ontario including its constitutionality;
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> (b) the interpretation, clarification or propounding of some general rule or principle of law;
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> (c) the interpretation of a municipal by-law where the point in issue is a question of public importance;

> (d) the interpretation of an agreement where the point in issue involves a question of public importance.
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> The Court will of course consider also cases where special circumstances would make the matter sought to be brought before the Court a matter of public importance or would appear to require that in the interest of justice leave should be granted -- such as the introduction of new evidence, obvious misapprehension of the Divisional Court of the relevant facts or a clear departure from the established principles of law resulting in a miscarriage of justice.
>
> The outlining of the foregoing criteria is not to say that in cases in which there is clearly an error in a judgment or order of the Divisional Court, it is not the duty of the Court of Appeal to grant leave so that it might correct the error. However, the possibility that there may be error in the judgment or order will not generally be a ground in itself for granting leave.

[4] In *West Whitby*, the panel underscored, in the passage from *Sault Dock* reproduced above, the importance of assessing the impact of a decision on the jurisprudence of Ontario. That panel likened this aspect of *Sault Dock* to the Supreme Court of Canada's distinct approach to leave to appeal applications.

[5] By contrast, the panel criticized the undue attention which, in their view, has been placed on the four categories enumerated to illustrate matters on which an arguable question must be established in order to meet the threshold for leave.

[6] Applying *Sault Dock*, the panel in *West Whitby* found the threshold for leave in the motion before them was met. In their view, the decision of the Divisional Court dismissing a judicial review application from an Ontario Energy Board

decision dealing with the interpretation of *Distribution System Code*, which the Board issued under the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sched. B. had significant impact beyond the parties.

[7] The panel in *West Whitby* also offered its perspective on how long the *Sault Dock* framework has been in place and why it is important to bring an "updated and flexible" approach to the leave framework.

[8] The question now to be considered is whether the principles governing leave applications before the Court of Appeal have changed in light of *West Whitby*. This question, of course, is important. If we were of the view the principles have changed, it would be necessary to permit the parties to make further submissions on their leave application in light of the new standard.

[9] In my view, the principles governing leave applications have not changed. I reach this conclusion for two reasons.

[10] First and most importantly, I see the approach taken by the panel in *West Whitby* as fitting squarely within the *Sault Dock* framework, as that panel interpreted *Sault Dock*.

[11] In describing the proper approach to leave applications, the panel excerpted the passage from *Sault Dock* reproduced above dealing with the impact a question may have on the jurisprudence of Ontario and stated, at para. 11, "Therein lies the heart of the consideration of an application for leave to appeal: not whether the

issue falls into some pigeon-hole on a checklist, but ‘the impact which the decision on the question will have on the development of the jurisprudence of Ontario.’" In other words, it appears that the *West Whitby* panel intended to highlight rather than change the principles governing leave motions from the Divisional Court to the Court of Appeal.

[12] Second, where parties (or the court) seek to revisit a precedent-setting decision of this court with the possibility of changing the law, a five-judge panel of the court may be requested or convened, so that full argument on the proposed change, and its implications, can be put before the court: see s. 13 of the *Practice Direction Concerning Civil Appeals at the Court of Appeal for Ontario*. No such request for a five-judge panel was made in the context of *West Whitby*.

[13] For these reasons, in my view, *West Whitby* should be read as a helpful discussion and application of the *Sault Dock* framework, which continues to be the source for the principles governing motions for leave to appeal from the Divisional Court to the Court of Appeal. I would leave for another day and an appropriate context the question of whether there is any need to revisit that framework before a five-judge panel.

ANALYSIS

[14] This brings me to the motion for leave to appeal before us. This motion for leave to appeal concerns whether a person who slipped and fell on parking lot ice

while reaching out to unlock her car suffered an "accident" under s. 3(1) of the *Statutory Accident Benefits Schedule* – effective September 1, 2010, O. Reg. 34/10 (the "SABS"). The responding party, Carrie-Anne Davis, slipped and fell. She sought accident benefits from her insurer, the moving party Aviva General Insurance Company ("Aviva"). The Licence Appeal Tribunal (the "Tribunal") ruled that Ms. Davis's slip and fall was not an accident because the ice, not her use and operation of her car, directly caused her injuries. The Divisional Court disagreed and ruled that Davis suffered an accident. In its view, Ms. Davis's use and operation of her car directly caused her injuries because she had her key fob in hand and was extremely close to her car when she fell.

[15] Aviva argues that this court should grant leave because the Divisional Court mischaracterized and misapplied the causation step of the SABS "accident" test. In its view, the causation step asks whether "the direct use or operation of a vehicle […] physically caused injury." While physical contact with a vehicle is not required, an applicant's mere presence for the purpose of using the vehicle at the location where they slipped and fell is insufficient. According to Aviva, the Divisional Court misapplied this test and took an overly flexible approach. Ms. Davis was not touching her vehicle when she fell and holding the key fob did not cause her to lose her balance. Rather, it was the ice she slipped on which physically caused her fall.

[16] The Tribunal takes no position on the leave motion and Ms. Davis does not oppose it.

[17] Applying the *Sault Dock* framework to this case, mindful of its breadth and flexibility, I do not see a question that meets the threshold for granting leave. This dispute is largely fact-specific, and Aviva has not made an arguable case for why the settled test for an "accident" under the SABS should be changed.

[18] Consequently, I would deny leave to appeal. As the motion was not opposed, I would make no order as to costs.

Released: December 27, 2024 "L.S."

"L. Sossin J.A."
"I agree. L. Madsen J.A."
"I agree. R. Pomerance J.A."